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514506—59——1

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 133

D. C. TRANSIT SYSTEM, INC., PETITIONER

v.

MARGARET H. SLINGLAND AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (App., *infra*, pp. 10–18) [1] is reported at 266 F. 2d 465.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1959. The petition for a writ of certiorari was filed on June 22, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The petitioner failed to print the opinion below in its petition as required by Rule 23(i) of the Revised Rules of this Court.

QUESTIONS PRESENTED

1. Whether, in meeting judgments for personal injury caused by the concurrent negligence of two tortfeasors, contribution between them was appropriate, rather than indemnification of one of them on the ground that different degrees of care were violated or on the ground of last clear chance.

2. Whether, where the judgments against two tortfeasors were in different amounts, it was appropriate to adopt a formula for contribution which gave recognition to that difference.

STATEMENT

The plaintiff, Margaret H. Slingland, sued Capital Transit Co. (now D. C. Transit System, Inc.) and the United States for injuries allegedly sustained in a collision between a negligently-parked Transit bus, in which she was a passenger, and a negligently-driven mail truck (R. 2–3). Transit's driver had left his bus parked at an angle at a bus stop, blocking westbound traffic on a two-way street (R. 47, 53, 55, 69), while he sought to locate the driver of a truck which the bus had scraped without any substantial damage (R. 36–37, 39–40, 44, 64, 67–68, 70–71). The mail truck then approached, travelling west, stopped behind the bus, and, when its driver realized that the bus was not going to move, attempted to pass around it. The accident ensued (R. 45–48, 50, 53, 55). The government driver testified that the mail truck struck the left rear of the bus when opposing eastbound traffic compelled him to pull close to it (R. 54). Miss Slingland was standing in the bus and the collision

caused her to fall down and inflicted injuries (R. 3, 34).

The case against the two defendants was tried simultaneously by a judge and a jury. Under the Tort Claims Act, the trial judge found the Government liable and assessed $10,000 damages (R. 19–21). The jury awarded $25,000 against Transit, which was reduced by remittitur to $15,000 (R. 13, 19). The district court then denied Transit's motion for complete indemnity from the United States and directed that Transit and the United States were each entitled to judgment by way of contribution in any amount which each should pay to the plaintiff in excess of one-half the judgment against it, and costs (R. 21–22).

Transit appealed from the judgment in favor of the plaintiff and the denial of indemnity. The United States appealed only from the order of contribution, under which it would have to pay one-half of Transit's judgment, or $7,500.

The Court of Appeals reversed the plaintiff's judgment against Transit on the ground that the jury had been erroneously instructed on *res ipsa loquitur* (App., *infra,* pp. 13–14).[2] It remanded the cause against Transit for a new trial (App., *infra,* p. 18). However, anticipating the possibility of another verdict against the bus company, the Court of Appeals went on to

[2] The court rejected Transit's other arguments against the verdict, holding that the evidence was sufficient to sustain it; that the charge on proximate causation was correct; that the traffic regulation prohibiting angle parking was a safety provision and Transit's violation of it was material; and that the presence of government employees on the jury panel was not error (App. *infra*, pp. 12–15).

decide the issues of indemnity and contribution in favor of the Government. It held, first, that indemnity was properly denied Transit (App., *infra*, pp. 15–16). "[W]ithout endeavoring in this controversial field of tort law to go beyond this case," the court ruled that the concurrent negligence of Transit and the United States called in equity for sharing of liability between them. The court refused to consider the fact that the United States might have had the last clear chance, or a different degree of care, as the basis for indemnity; and held that neither defendant could be said to have been the primary or principal wrongdoer responsible for the whole loss (App., *infra*, p. 16).

As to contribution, the Court of Appeals agreed with the United States that an order requiring it to pay one-half a joint tortfeasor's judgment might, in some instances, improperly compel payment of an amount exceeding the Government's own liability to the plaintiff. Increasing the United States' liability as a result of a higher jury verdict against another tortfeasor conflicted with the specific exclusion of jury trial from the Tort Claims Act. The court adopted one of several alternative suggestions advanced by the Government as a fair and equitable solution. It ruled that each tortfeasor should pay that percentage of the judgment against it which the larger of two judgments bears to the sum of both judgments—applied to the awards in this case, the proportion $\frac{\$15,000}{\$25,000}$ or 60 percent. Therefore, the United States would pay 60% of $10,000, or $6,000; Transit 60% of

$15,000, or $9,000. The Court pointed out that this formula gives some weight to the jury finding and also to the fact that the United States, in consenting to suit, limited its liability to an amount assessed by the trial judge (App., *infra*, pp. 16–18). Accordingly, the Court of Appeals set aside the district court's order of contribution and directed that, if the question of contribution should arise after the new trial on remand, it should be determined consistently with the opinion entered (App., *infra*, p. 18).

ARGUMENT

1. The only issues which the petitioner seeks to bring before this Court deal with indemnity and contribution between joint tortfeasors. But the court below reversed the verdict for the plaintiff against the petitioner so that, as things now stand, there is no judgment against it on which it can seek indemnification and no adjudged liability which can form the basis for contribution. The issue on indemnity will arise again only if the case is in fact retried and if the petitioner is again found liable. The issue on contribution will arise again only if those two factors occur and if the damages assessed amount to more than $10,000. Clearly, therefore, it is premature to ask this Court to consider these issues at this time. Under these circumstances the Court should deny the writ. See *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U.S. 372, 384.

2. In this case the Court of Appeals for the District of Columbia Circuit has adopted rules governing indemnity and contribution between joint tortfeasors

and applied them to the facts of a particular accident. Such determinations of the local common law of the District of Columbia are entrusted to the courts below. *Griffin* v. *United States,* 336 U.S. 704, 712–718; *Fisher* v. *United States,* 328 U.S. 463, 476; *District of Columbia* v. *Pace,* 320 U.S. 698, 702.

The petitioner urges certiorari on the ground that "it is most important that the correct common law principle be announced by the Supreme Court of the United States" since the issues arise throughout the country and the alternative is "scores of courts * * * each applying its individual notion * * *" (Pet. 6–7). The answer is found in *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64. The same policy which leaves common law questions to the highest court of each state has distinguished between federal law and local District of Columbia rules (e.g., *Griffin* v. *United States,* 336 U.S. at 712) and leaves the latter to the courts below. The petitioner cites other courts which differ on these principles, or application of them (Pet. 6–8; n. 3, *infra*), but this does not give rise to any "conflict" in federal terms which would warrant, or sustain, this Court's jurisdiction.

3. While this Court's supervisory power over local District of Columbia law provides a separate basis for jurisdiction, there is here no "egregious error" calling for such consideration (*Fisher* v. *United States,* 328 U.S. at 476). On the contrary the decision below was sound and well-reasoned on both points challenged by the petitioner.

First, the denial of complete indemnity follows from the availability below of the flexible and fair

instrument of contribution. In this jurisdiction, indemnity, the shifting of liability, has been approved (absent a contract) only where one tortfeasor failed to exercise due care while the other was not liable under ordinary negligence principles, but because of an absolute nondelegable duty (e.g., a municipality for defects in highways) or because of vicarious, imputed liability. *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F. 2d 219, 222 (C.A.D.C.); *Washington Gas Light Co.* v. *District of Columbia*, 161 U.S. 316; *George A. Fuller Co.* v. *Otis Elevator Co.*, 245 U.S. 489; *Warner* v. *Capital Transit Co.*, 162 F. Supp. 253, 255 (D.D.C.). Where both tortfeasors are negligent, contribution and not indemnity is the rule. The most common type of contribution case, illustrated again here, is a motor vehicle accident in which both drivers violated traffic regulations. E.g., *Knell* v. *Feltman*, 174 F. 2d 662 (C.A.D.C.); *George's Radio, Inc.* v. *Capital Transit Co., supra;* see Note, 45 Harv. L. Rev. 349, 353.[3]

[3] *United States* v. *Savage Truck Line*, 209 F. 2d 442 (C.A. 4), certiorari denied, 347 U.S. 952, relied upon by Transit (Pet. 4, 5), is clearly distinguishable. The case arose under the law of another jurisdiction and indemnity was largely based upon a contract between the parties. Furthermore, even under the rule of primary and secondary fault mentioned in *Savage Truck Line*, the driver of an illegally parked vehicle is held equally at fault with one who collides with it and, therefore, is not entitled to indemnity. Cf. *DeBardelaben* v. *Stallings*, 226 F. 2d 951 (C.A. 4); *Krametbauer* v. *McDonald*, 44 N.M. 473, 104 P. 2d 900. Similarly, even under the rule of higher and lower degree of care cited (Pet. 6–7), the negligence of Transit's driver was of the same order as the government's, since each violated traffic regulations applicable to all vehicles.

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4. As to the extent of contribution, the percentage formula adopted below represents a fair solution to the perplexing problem of judgments in different amounts against several tortfeasors.

As the court below noted, an order requiring the United States to pay one-half of Transit's $15,000 liability results in inequality: the United States would have to pay 75 percent of its own liability. The same approach might result in a "contribution" greater than the damages recoverable from a tortfeasor by the injured party (App., *infra*, pp. 16–17). Accordingly, the Court of Appeals devised a formula which assures that contribution can never exceed the amount of a tortfeasor's liability to the injured party and strikes a compromise between the two inconsistent judgments. Under it, each party pays that proportion of the judgment against it which the larger of the two judgments bears to the sum of the two judgments. Illustrating with the original awards here, the United States would have paid 60% of its liability—$6,000, while Transit paid the same proportion of its liability—$9,000.[4] By contribution, each tortfeasor is therefore relieved of part of its liability to the plaintiff, and the outcome was surely within the equitable discretion of the court below.

[4] These are the terms in which the formula was proposed in Note, 68 Harv. L. Rev. 697, 705–706. Another way of stating the same computation is that each tortfeasor pays that proportion of the damages paid which his judgment bears to the sum of the two judgments.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

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JULY 1959.

APPENDIX

United States Court of Appeals for the District of Columbia Circuit

No. 14649

D. C. TRANSIT SYSTEM, INC., APPELLANT

v.

MARGARET H. SLINGLAND, ET AL., APPELLEES

No. 14706

UNITED STATES OF AMERICA, APPELLANT

v.

D. C. TRANSIT SYSTEM, INC., APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided April 17, 1959

Mr. Frank F. Roberson, with whom *Mr. John J. Ross* was on the brief, for appellant in No. 14649 and appellee in No. 14706. *Mr. John P. Arness* also entered an appearance for appellant in No. 14649.

Mr. Lionel Kestenbaum, Attorney, Department of Justice, with whom *Assistant Attorney General Doub, Messrs. Oliver Gasch,* United States Attorney, and *Morton Hollander,* Attorney, Department of Justice, were on the brief, for appellant in No. 14706.

Mr. Joseph S. McCarthy, with whom *Messrs. Wilbert McInerney* and *Edward C. Donahue* were on the brief, for appellee in No. 14649.

Before PRETTYMAN, *Chief Judge,* and FAHY and DANAHER, *Circuit Judges.*

FAHY, *Circuit Judge:* Slingland, plaintiff in the District Court, sued the D.C. Transit System, Inc.,[1] and the United States, for damages due to personal injuries sustained when a Transit bus in which she was a passenger was struck by a mail truck operated by an employee of the Post Office Department.

The case against Transit was tried to a jury at the same time the presiding judge tried the case against the United States under the Federal Tort Claims Act. The jury awarded plaintiff a verdict against Transit for $25,000, reduced by remittitur to $15,000. The judge found against the United States, and for the same injuries assessed $10,000 as the damages.

In post trial motions Transit sought exoneration from the United States, or in any event contribution of one-half of any sum awarded plaintiff against Transit. The court denied the motion for exoneration but held that the defendant which paid the judgment against it would be entitled to contribution from the other of any amount exceeding one-half the judgment paid.

In No. 14649 Transit appeals from the $15,000 judgment and also from the court's refusal to require the United States to indemnify or exonerate it entirely. In No. 14706 the United States appeals from the order of the court regarding contribution.

Transit's bus was traveling west on a Washington street. The driver, wishing to make a regular stop, could not bring the bus parallel to the curb because a Coca-Cola truck was parked in a portion of the parking space reserved for the bus. The driver accord-

[1] Referred to herein as Transit, appellant and cross-appellee in No. 14649, and also appellee in the appeal of the United States in No. 14706.

ingly nosed in toward the curb, leaving the bus angled out toward the center of the street. In this maneuver the bus scraped the Coca-Cola truck. The bus driver got off, leaving the bus in its angled position, and attempted to locate the driver of the Coca-Cola truck in nearby stores. He was gone for some minutes. During this time the mail truck came up behind the bus, stopped, and then started around it to continue westward. However, it failed to clear the bus entirely, striking its left rear corner and causing the plaintiff in the bus to be thrown and injured.

We think the evidence was sufficient to support recovery against both Transit and the United States. The United States was clearly negligent in a manner proximately to cause the injuries; but so also could the jury find as to Transit. The court charged the jury that the question was whether the acts of the drivers of the bus and mail truck united to produce the result and constituted mutually contributing acts on the part of both, or, as the court also put the matter, whether the act of the mail truck driver interrupted the sequence of events set in action by the bus driver, or concurred therewith so as to constitute in time and effect essentially one transaction. This was a correct statement of the problem created by the evidence.

Transit urges error in the admission in evidence of traffic regulation 76.[2] In substance it prohibits the parking or standing of a vehicle otherwise than parallel with the edge of the roadway and headed in the direction of the lawful movement of traffic, except that a passenger vehicle may stop parallel to parked vehicles long enough actually to take on or let off passengers if no curb space is available within a reasonable

[2] Transit's point about the regulation questions only its admissibility and not the instruction to the jury.

distance, and provided the vehicle while so double-parked will not unreasonably impede or interfere with orderly two-way traffic. Transit says that since regulation 76 permitted double parking the angling of the bus even if technically a violation of the regulation was reasonable in the circumstances and, in any event, was an immaterial violation. Transit works into this argument an attempted justification of its driver's conduct by reason of traffic regulation 17, to the effect that where there has been substantial damage to property, here the scraping of the Coca-Cola truck, the operator is required to stop, give assistance, and inform the owner or operator of the other vehicle of the name and address of the owner and operator of the vehicle causing the injury.

Regulation 76 is designed for the safety of the public[3] and is not merely "intended and phrased to promote the rapid and uninterrupted flow of traffic" as Transit suggests. This being so, and the evidence affording a basis for the jury to conclude that the regulation was violated, its reception in evidence was not error; nor can we say the court was required to rule that its violation, if found by the jury, was immaterial. Moreover, the obligation of Transit's driver to comply with regulation 17 did not require him to leave the bus in its diagonal position while he searched for the operator of the Coca-Cola truck.

On the doctrine of *res ipsa loquitur* the court charged that the happening of the accident gave rise to an inference that Transit was negligent, and that if no evidence tended to overcome this inference, or if the inference preponderated over contrary evidence, the inference warranted, but did not require, a finding

[3] *Violette* v. *Campbell*, 134 A. 2d 330 (D.C. Mun. App. 1957); and see *Pugh* v. *Akron-Chicago Transp. Co.*, 137 Ohio St. 164, 28 N.E. 2d 501 (1940); *Murphy* v. *St. Claire Brewing Co.*, 41 Cal. App. 2d 535, 107 P. 2d 273 (1940).

of negligence. So far so good. But the court cautioned the jury to bear in mind that, "it is incumbent upon the defendant to rebut the inference by showing that it did through its bus driver in fact exercise the degree of care owing by the defendant company to the plaintiff. * * *" This was error, and was the subject of a seasonable objection by Transit. The rule in this jurisdiction is that where *res ipsa loquitur* applies, as here against Transit, the jury "are at liberty to decide for themselves whether the preponderance is with the plaintiff even where there is no evidence to countervail the inference." *Underwood* v. *Capital Transit Co.*, 87 U.S. App. D.C. 68, 70, 183 F. 2d 822, 824, *cert. denied*, 340 U.S. 931, relying upon *Sweeney* v *Erving*, 228 U.S. 233, which arose in this jurisdiction. In other words, even in the absence of countervailing evidence the jury is not required to find negligence. The error in the contrary implication of the charge is not rendered harmless, as plaintiff contends, by the fact Transit sought by evidence to rebut the inference of negligence. For all we know the jury might have disregarded this evidence and yet have felt obligated, because of the charge, to rely upon Transit's failure to rebut the inference of negligence. This they were not required to do.

Transit also urges error in denial of its request for a new jury panel, based on the presence of sixteen government employees among the twenty-four prospective jurors. In *United States* v. *Wood*, 299 U.S. 123, however, the Supreme Court upheld and applied the Act of August 22, 1935, now § 11-1420 D.C. Code (1951), under which employees of the United States are eligible for jury service in the District of Columbia, saying in part:

> We think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of

> the nature and circumstances of particular cases, rests on an assumption without any rational foundation.

299 U.S. at 149. This decision must be applied to civil as well as to criminal cases.

Transit seeks complete exoneration from the United States on the theory the driver of the mail truck had the last clear chance to avoid the accident. If Transit were entitled to exoneration we would have the anomalous situation of Transit in effect recovering $15,000 from the United States though the liability of the United States to plaintiff is only for $10,000. This aside, however, we think the case is not one for exoneration, but, as the trial court held, for contribution between the two joint tortfeasors.

The principle of contribution is fairly well settled in this jurisdiction, notwithstanding the absence of a statute. *George's Radio* v. *Capital Transit Co.*, 75 U.S. App. D.C. 187, 126 F. 2d 219; *Knell* v. *Feltman*, 85 U.S. App. D.C. 22, 174 F. 2d 662. See, also, *McKenna* v. *Austin*, 77 U.S. App. D.C. 228, 134 F. 2d 659. As pointed out in *George's Radio*, where the parties are not intentional and willful wrongdoers, but are such only by legal inference or intendment the whole loss should not be imposed unconditionally upon one of them alone. The case might be different where there is "a primary or basic liability in one person, though a second is also liable with the first to a third." 75 U.S. App. D.C. at 190.

> The difference between indemnity and contribution—in cases between persons liable for a wrong—is that in the former the law implies an agreement or obligation and enforces a duty on the primary or principal wrongdoer to respond for all the damages, whereas in the latter, there is no agreement, express or implied, but a common burden in which the parties stand in

> equali juri and which in equity and good conscience should be equally borne.

75 U.S. App. D.C. at 190.

Notwithstanding some support for Transit's position, see, for example, *United States* v. *Savage Truck Line*, 209 F. 2d 442 (4th Cir. 1953), cert. denied, 347 U.S. 952, and without endeavoring in this controversial field of tort law to go beyond this case, we think the concurrently negligent participation of both defendants, even though the United States might have had the last clear chance, calls "in equity and good conscience" for no more than contribution between them. This is so notwithstanding Transit owed a duty to its passenger to exercise a higher degree of care than was owed to her by the United States. See *Warner* v. *Capital Transit Co.*, 162 F. Supp. 253 (D.D.C. 1958). Neither of these defendants could be said to be "the primary or principal wrongdoer" responsible for the whole loss.

As to the amount of the contribution, the situation is somewhat unusual because the judgment against Transit is for $15,000, while for the same injuries there is a judgment against the United States for only $10,000. The trial court ruled that if Transit were called upon to pay the $15,000 judgment the United States should contribute $7,500, but that if, instead, the plaintiff required the United States to pay the $10,000 judgment Transit should contribute $5,000. We think this needs some modification. The United States in consenting to be sued has by statute limited its liability to an amount fixed by a judge rather than by a jury. Yet, under the ruling of the court the United States as one of the two joint tortfeasors might be compelled to pay substantially more than one-half its liability due to the fact that the jury awarded for

the same injuries a greater amount than was awarded by the judge.[4]

The United States urges that it should be required to contribute only fifty per cent of the common liability. Since the liability common to both is $10,000 this would mean a payment of $5,000. This we think would be the fair and equitable solution in the event resort were had by plaintiff only to the $10,000 judgment against the United States. If, however, as is much more likely, plaintiff should obtain payment from Transit of the larger judgment of $15,000, an alternative solution referred to by the United States would require each to pay that percentage of the judgment against it which the larger of the two judgments bears to the sum of both judgments; that is, sixty per cent.[5] Under this plan the United States would contribute $6,000 to a $15,000 payment by Transit, the latter thus paying in the end $9,000. Confining ourselves in this unsettled field of tort law to the needs of this particular case, brought under the Tort Claims Act against the United States, with no statutory rule to guide, we adopt this sixty per cent formula as a fair and equitable solution. It gives weight to the fact that the United States in consenting to be sued has set an outside limit of liability at an amount assessed by a judge. At the same time it gives some weight to the amount of damages assessed by a jury, thus requiring the United States to contribute to the larger judgment paid by the other tortfeasor sixty rather than fifty per

[4] Moreover, such a 50% contribution plan could result, in a different factual situation, in the United States contributing even more than its total liability. This would be so were a judge, for example, to assess the damages against the United States at less than $7,500 while a jury for the same injuries assessed damages against Transit at $15,000.

[5] The sum of the judgments is $25,000, of which amount the $15,000 larger judgment is 60%.

cent of the smaller amount assessed by the judge. See 68 Harv. L. Rev. 697, 705–06 (1955).*

The result is that the judgment against the United States is affirmed and that against Transit is reversed because of the erroneous instruction to the jury on *res ipsa loquitur*. The case against Transit accordingly is remanded. The order of the District Court prescribing contribution is set aside. Should the question of contribution arise on the remand, it should be determined consistently with this opinion.

It is so ordered.

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* We are indebted to the parties for their able and full briefing of the problem. They cite many cases and authorities which we have considered though not referred to in our text.

U.S. GOVERNMENT PRINTING OFFICE: 1959